No. 82-1504

In the Supreme Court of the United States

October Term, 1982

L. G. EVERIST, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The Government contends that the inferences of fact drawn by the petitioner in this case are "plainly unreasonable." (Opp. 3-4) The Ccurt of Claims, however, *never* held that any of the inferences of fact drawn by the petitioner in this case were in any way unreasonable. The Government contends that the Court of Claims held that the conclusions drawn by the petitioner in this case were "factually unsupportable." (Opp. 4) The Court of Claims, however, *never* held that any of the conclusions drawn by the petitioner in this case were in any way factually unsupportable. *The Government cannot—and does not—point to any such statements or holdings by the Court of Claims in this case.*

Rather, the Court of Claims *specifically* held that it was undertaking summary judgment in this case *not* upon any finding that the inferences and conclusions of fact drawn by the parties were not in genuine dispute, but *solely and expressly* upon the Court's conclusion that the "underlying" material facts contained in the record were *themselves* not in genuine dispute.

> "Before reciting the facts, we note our conclusion that there are no genuine issues of material fact in the record which would, in themselves, preclude summary judgment. While the inferences and conclusions drawn from the facts by the parties differ radically at times, *the underlying material facts are not in genuine dispute.*" (Pet. App. A2) (Emphasis added.)

Indeed, the Court of Claims thus recognizes—*and acknowledges*—that the inferences and conclusions of fact drawn by the parties in this case are in *fundamental* dispute.

Where conflicting inferences of fact are properly drawn from the "underlying" facts, summary judgment

is wholly inappropriate. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962) On a motion for summary judgment, a court may not speculate as to the ultimate findings of fact. *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 506, 89 S. Ct. 1252, 1260 (1969).[1] Moreover, on a motion for summary judgment, the moving party has the burden of demonstrating the absence of a genuine issue as to any material fact, *including any inferences of fact. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-160, 90 S. Ct. 1598, 1608-1610 (1970). All such inferences must be viewed *in the light most favorable* to the non-moving party. *Diebold, supra; Adickes, supra.* The Government, as the moving party, must *conclusively* show that the facts contained in the record are "not susceptible" of an interpretation that might give rise to the inferences drawn by the petitioner. *Adickes, supra* at 160, n. 22, 90 S. Ct. 1610, citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1593 (1968). "[A]ny doubt as to the existence of a genuine issue of material fact must be resolved against . . . the moving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-159 (1970)." *Board of Education v. Pico*, ... U.S. ....., ..., 102 S. Ct. 2799, 2806 (1982) (Opinion of Brennan, J.)

The United States has *never* attempted to show that any of the crucial inferences of fact drawn by petitioner in this case are anything other than entirely reasonable and proper. Indeed, the Government has simply restated the alleged inferences which it draws from the underlying facts. Such assertions by the Government serve only to

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1. See also *Empire Electronics Co. v. United States*, 311 F 2d 175, 179-180 (CA 2 1962): "This case presents us with a situation where the so-called evidentiary facts—the underlying physical data—are not in dispute; but the inferences of fact to be drawn from them are disputed. * * * 'A judge may not, on a motion for summary judgment, draw fact inferences.' " (Kaufman, J.)

confirm the existence of issues of ultimate fact, *not* to demonstrate the propriety of summary judgment.[2]

2. The Government states that "The specifications required the contractor to locate [and] select . . . the source of rocks to be used in the project." Yet, the Government fails to provide *any* reference to such alleged "specifications." (Opp. 2) In fact, Construction Specification 216-8, "Rock Riprap" *expressly* directs—at Section 2, "*MATERIALS*"—that "Rock from the designated sources, or from other sources approved by the Engineer shall be excavated, selected, and handled as necessary to meet the grading requirements in Section 8 of this specification or on the drawing," thus specifically establishing a *mandatory* item of subsurface contract work. (Pet. A19) In conjunction with Construction Specification 216-8, Clause 2—"SPECIFICATIONS AND DRAWINGS"—of the General Provisions further expressly provided that: "The Contracting Officer [including his authorized representative] shall furnish from time to time such . . . other information as he may consider necessary, unless otherwise provided." (Pet. A17)[3] On April 4, 1979 the Project Engineer (who

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2. The Government states that "Petitioner discusses at length (Pet. 16-30) the inferences it draws from the facts, but those fact—specific arguments were fully considered and properly rejected by the Court of Claims." (Opp. 4, n. 2) As noted above, however, the Court of Claims *explicitly* decided this case *not* upon any conclusion that the conflicting inferences and conclusions of fact drawn by the parties were not in genuine dispute, but *solely and expressly* upon the court's conclusion that the underlying facts *themselves* were not in genuine dispute. (Pet. App. A2) Indeed, the court *acknowledges* that the inferences of fact drawn by the parties are in *fundamental dispute*. "Selecting one set of conflicting inferences, as opposed to another, is part of the ultimate fact-finding process, not of the disposition at the summary judgment stage." *Cole v. Cole*, 633 F. 2d 1083, 1089 (CA 4 1980).

3. *Cf. Emery & Co. v. American Refrigerator Co.*, 246 U.S. 634, 637, 38 S. Ct. 414, 415 (1918) (Holmes, J.). ("[T]he con-

(Continued on following page)

was also the authorized representative of the Contracting Officer) conducted a group, pre-bid "worksite" tour of the Lackner Quarry in accordance with the special "INSPECTION OF WORKSITE" provision contained in the Invitation for Bids. (Pet. 23-24) Pursuant to Clause 2 of the General Provisions, the Project Engineer provided the necessary *further identification* of the Lackner Quarry —already expressly referred to in Section 2 *"MATERIALS"* of Construction Specification 216-8 as the "designated" and "approved" source—by personally identifying its location for the benefit of the prospective bidders, as an integral part of the worksite tour. (Pet. 19-21) In this regard, the Project Engineer expressly testified: "The *designated* area was approved, yes." (Pet. A28) (Emphasis added.) Cf. *S.J. Groves & Sons Co. v. United States*, 106 Ct. Cl. 93, 100-101, 121-125 (1946). The Project Engineer further instructed the prospective bidders that: "The rock is going to come from the Lackner Quarry." (Pet. App. A32-A33) Petitioner's President testified that, prior to the bidding, it was his understanding of the contractual requirements that "the material would come from designated source," and that the Lackner Quarry was the designated source. (Pet. 20) The Government has never even attempted to address the foregoing facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.*

The Government states that "the court rejected petitioner's claim under the contract's Differing Site Conditions clause because the terms of the contract made it

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Footnote continued—

tract 'is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfillment is like the reference to a document that it adopts and makes part of itself.' *Louisville & Nashville R.R. Co. v. Western Union Telegraph Co.*, 237 U.S. 300, 303.")

clear that Lackner Quarry was not the work site to which the clause applied; it was merely a potential source of rock to be used at the work site (*id.* at A9)." (Opp. 3) The Court of Claims, however, *never* held that "the terms of the contract made it clear" that the Lackner Quarry was not part of the Project worksite for purposes of the Differing Site Conditions clause, *and no such statement is contained anywhere in the opinion of the Court of Claims, either on page A9 or elsewhere.* (Pet. App. A1-A12) General Provisions Clause 4—"DIFFERING SITE CONDITIONS"—contained in the Invitation for Bids *expressly* provides that "an equitable adjustment *shall* be made" for "(1) *Subsurface or latent physical conditions at the site* differing materially from those indicated in this contract, or (2) *unknown physical conditions at the site,* of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering *in work of the character provided for in this contract.*" (Pet. A17-A18) (Emphasis added.)[4] Construction Specification 216-8, as noted above, expressly established the excavation, selection and handling of the rock from the Government-designated Lackner Quarry as *a mandatory item of subsurface contract work.* As such, that excavation, selection and handling of the rock at the Government-designated Lackner Quarry was, *by definition,* "at the site" within the meaning of the Differing Site Conditions clause; and the excessive waste rock which was encoun-

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4. The Government's version of the Differing Site Conditions clause alluded to in its Memorandum in Opposition refers only to category "(1)" relating to conditions differing materially from those indicated in the contract. (Opp. 2) Petitioner, however, submitted its claim for the excessive waste rock condition encountered at the designated Lackner Quarry pursuant to *both* category (1) and category (2) of the Differing Site Conditions clause, and its cause of action for an equitable adjustment in the Court of Claims was expressly based on both category (1) *and* category (2) of the Differing Site Conditions clause (Pet. A2; A9)

tered at that source was therefore clearly and explicitly within the coverage of the mandatory equitable adjustment provisions of that clause. (Pet. 25) The Government has *never* addressed these facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.*

Moreover, the Assistant Contracting Officer for the Project, who attended that pre-bid worksite tour on April 4, 1979, *expressly testified* that the Lackner Quarry was shown to the prospective bidders by the Project Engineer *as an integral part of the Project worksite.* (Pet. 24) Furthermore, the Government itself treated the quarry operation at the Lackner Quarry as an integral part of the Project contract "work," throughout the performance of the contract. (Pet. 25, n. 13) The Government has *never* attempted to show that the foregoing evidence is not susceptible of an inference that the Lackner Quarry was fully intended to be "at the site" within the meaning of the Differing Site Conditions clause. *Adickes, supra.* Indeed, these facts, and the inferences drawn therefrom, provide *clear and convincing* evidence that the Lackner Quarry was fully intended to be "at the site" under the Differing Site Conditions clause.

The Government asserts that "Finally, as the Court of Claims held (*id.* at A9), the 'Differing Site Conditions' clause was never intended to cover a quarry neither owned by the government nor designated as the source of rock for the project." (Opp. 4, n. 2) *The Court of Claims never held, in this or in any other case, that the Differing Site Conditions clause was "never intended" to apply to such quarries or other project materials sources not owned by the Government, and no such statement appears either on page A9, or on any other page of the court's order of summary judgment.* (Pet. App. A1-A12) Indeed, the Court of Claims, as well as the Federal Boards of Contract Appeals, have

on countless occasions directed equitable adjustments to be made under the Differing Site Conditions clause for such conditions encountered at privately-owned project materials sources. See, *e.g., Briscoe v. United States,* 194 Ct. Cl. 866, 442 F. 2d 953 (1971); *Morrison-Knudson Company, Inc. v. United States,* 113 Ct. Cl. 536 (1949); *Construction Aggregates Corp.,* ENG BCA No. 4242,81-1 BCA ¶14,855 (Dec. 31, 1980) (Government-"approved," privately-owned, commercial quarry).[5] Furthermore, as noted above, the record in this case provides *abundant* evidence in support of the irrefutable conclusion that the Lackner Quarry was the contractually designated source of rock for this Project. (Pet. 19-21)

Moreover, the failure of the Lackner Quarry to provide the specified 75,000 tons of rock riprap without excessive waste constituted distinct breaches of the Government's express and implied warranties of suitability of that source. (Pet. 16-21) In designating the Lackner Quarry as the source of rock for the Project, the Government *impliedly* warranted that the quarry would serve as a commercially suitable source of rock for the Project. (Pet. 19-21) See, *e.g., Tobin Quarries, Inc. v. United States,* 114 Ct. Cl. 286, 84 F. Supp. 1021 (1949) and *United States v. Johnson,* 153 F. 2d 846 (CA 9 1946). In addition, the Government in this case *expressly* warranted the suitability of the Lackner Quarry as the source of rock for the Project. (Pet. 16-19) Construction Specification 216-8 expressly provided that "The suitability of the rock for riprap shall be approved by the Engineer." (Pet. A19) During the Government's pre-

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5. Not only does the Differing Site Conditions clause make no reference whatsoever to the "ownership" of the site as affecting the scope of its coverage, but the regulations under which this Project was undertaken *specifically contemplate and provide* that such Soil Conservation Service projects will in many instances be performed on privately-owned worksites. See, *e.g.,* 7 CFR §624.8 and 7 CFR §656.6(g)(2).

bid worksite showing of the Lackner Quarry, the Project Engineer instructed the prospective bidders that the rock *at that source* was "approved" and that the Government geologist had determined that it was rock "of quality." (Pet. 17) He further advised the prospective bidders that the Government geologist had determined that the rock was "hard enough for riprap", by which he further testified that he meant "The hardness is such that it won't break up in handling." (Pet. 17; 22) Petitioner's Construction Manager, who prepared the bid for the Project, testified that: "The rock source appeared to me to be competent, suitable for the use intended and we had been informed that it was an approved source and rock in the source had been approved, *which indicated to me that construction losses would certainly be within normal amounts, ratios.*" (Pet. 17) (Emphasis added.) The Government has never addressed any of the foregoing facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.* As the Government itself admits, the construction losses encountered at the Lackner Quarry were indeed *far* from normal: well over 60-70% of the total rock materal excavated, selected and handled from that source—*by the Government's own count*—was unsuitable for use as riprap, resulting in enormous unanticipated costs and delays in the performance of the contract. (Pet. 7; Pet. App. A24; Opp. 2)

In addition to the breach of its express and implied warranties, the Government further breached this contract by its non-disclosure of its actual superior knowledge concerning the geological conditions affecting the suitability of the rock at the Lackner Quarry. (Pet. 27-30) And in this case the Government went *beyond* non-disclosure, and engaged in *active concealment.* (Pet. 21-22) Not only were the November 27, 1978 geological Trip Report, and the conclusions and the recommendations of the

Government geologist contained therein, not disclosed to the prospective bidders, but the Project Engineer *affirmatively* represented to the prospective bidders that the Government geologist had *approved* the source, and that he had determined that it was rock of quality and hard enough for riprap. In the face of the Government's geologist's actual conclusions and recommendations, the Government's statements to the prospective bidders constituted a gross misrepresentation of the facts. (Pet. 21-22) Moreover, the Government's contention that "petitioner's employee reached nearly an identical conclusion regarding the nature of the quarry" (Opp. 4, n. 2) *has absolutely no support in the record of this case.* The Government geologist testified that, on the basis of his geological site investigation in November, 1978, he was not surprised by the excessive waste actually encountered by petitioner at the Lackner Quarry, and that indeed *he expected such excessive waste to be encountered.* (Pet. 29) Petitioner's Construction Manager, by contrast, expressly testified: *"The rock source appeared to me to be competent, suitable for the use intended,* and we had been informed that it was an approved source and the rock in the source had been approved which indicated to me that construction losses would certainly be within normal amounts, ratios." (Pet. 17) (Emphasis added.)[6] The Government has never responded to the foregoing facts, and the inferences drawn therefrom by petitioner. *Adickes, supra.*

3. The Government contends in its Memorandum in Opposition that "since the decision affects no one other

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6. The Government geologist testified that the fractures and joints which he observed were the result of geological faulting, and that accordingly subsurface weathering of the bedrock was to be expected to be encountered. (Pet. 28-29) Petitioner's Construction Manager, a civil engineer, expressly testified he did *not* expect the subsurface bedrock to be weathered. (Pet. 27-28)

than petitioner, it does not warrant review by this Court." (Opp. 4) But the United States Court of Appeals for the Federal Circuit expressly adopted *all* of the holdings of the Court of Claims announced prior to the close of business on September 30, 1982, and, accordingly, the holding of the Court of Claims in the instant case becomes part of the body of law of that newly-established Federal judicial circuit. *South Corporation v. United States,* 690 F. 2d 1368, 1369 (CAFC 1982). Furthermore, the summary judgment rule prescribed by the Court of Claims in this case is in *direct* conflict with the basic rule of summary judgment prescribed by the Supreme Court in *United States v. Diebold, Inc., supra,* and in *direct* contravention of petitioner's statutory right to trial *de novo* under §10(a) of the Contracts Disputes Act of 1978 (41 U.S.C. §609(a)). The Court of Claims has, in this case, so fundamentally erred and so completely and openly departed from the usual and accepted course of judicial proceedings as to fully warrant the exercise of this Court's power of supervision. *La Buy v. Howes Leather Co.,* 352 U.S. 249, 256, 77 S. Ct. 309, 313-314 (1956); *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115, 124, 76 S. Ct. 663, 668 (1956). This case presents a most fitting occasion for the Court to reaffirm that all orders of summary judgment—whether published or unpublished—must accord with the basic rules of practice and procedure prescribed by the Supreme Court.

It is therefore respectfully requested that the petition for writ of certiorari be granted, that the order of summary judgment be vacated, and that this case be remanded to the United States Claims Court for the trial *de novo* of the disputed issues of fact, in accordance with 41 U.S.C. §609(a)(3).

BERNARD M. JUNG